IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2009 Session

NANCY CHANDLER SMALL v. DANIEL WALLACE SMALL, JR.

Appeal from the Circuit Court for Davidson County
No. 06-D-0564 Carol Soloman, Judge

No. M2009-00248-COA-R3-CV - Filed January 28, 2010

In this divorce action, Husband appeals numerous holdings of the trial court, including: the ground upon which the divorce was granted; the nature and amount of spousal support; the determination of the amount of marital property and the division of marital assets and liabilities; certain aspects of the parenting plan ordered by the court; and the entry of the final decree of divorce retroactive to the date the court entered its findings and conclusions. Finding that the trial court erred in the amount of earning capacity imputed to each party, the awards of spousal and child support are reversed and remanded for redetermination. Finding that the trial court erred in the determination of the marital assets, the division of marital property is reversed and remanded for reconsideration. Finding that the trial court erred in imposing a restriction on Husband's visitation and in setting the parenting schedule, those matters are reversed. Finding that the court did not err in ordering Husband to maintain life insurance for the benefit of the child, entering the final decree *nunc pro tunc*, and in its credibility determination regarding Husband, those judgments are affirmed. Husband's appeal of the trial court's grounds for divorce is determined to be moot. The court's determination to award counsel fees to Wife is affirmed and the issue remanded for redetermination of the amount to be awarded; Wife's request for attorney's fees incurred on appeal is granted and the matter remanded to the trial court for a determination of the amount to be awarded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Jeffrey Alan Green and Gregory Hall Oakley, Nashville, Tennessee, for the appellant, Daniel Wallace Small, Jr.

Michael W. Binkley, Franklin, Tennessee, for the appellee, Nancy Chandler Small.

OPINION

I. Procedural and Factual Background

Nancy Chandler Small ("Wife") and Daniel Wallace Small, Jr. ("Husband") were married on August 8, 1987. On February 21, 2006, Wife filed a complaint for divorce on the grounds of irreconcilable differences and inappropriate marital conduct; at the time Wife filed her complaint, the parties had two minor children. On February 22, the trial court entered a Temporary Restraining Order, preventing, among other things, the disposal of any marital property. Husband vacated the marital residence in March 2006.

On August 16, 2006, Husband filed an answer and counter-complaint, denying that he was guilty of inappropriate marital conduct, raising the affirmative defense of Wife's ill conduct, and seeking a divorce on the grounds of irreconcilable differences and inappropriate marital conduct. After the parties separated, Husband voluntarily provided Wife $11,000.00 per month to pay bills and expenses.

On January 28, 2008, the trial court entered an agreed order, allowing Wife to amend her complaint for divorce to allege the additional ground of adultery; Husband answered, admitting that he was guilty of adultery. On May 12, 2008, the trial court entered an agreed *pendente lite* order, setting Husband's residential time schedule with the children as every other weekend; every other Monday, following Mother's weekend with the children; and Father's Day.

A trial was held over three days on April 28, July 17, and August 12, 2008. On October 29, 2008, the trial court entered its Findings of Fact, which made the following findings, in part pertinent: (1) the older of the two children was 19 years old and emancipated; (2) Wife had not worked outside the home since 1987; (3) Husband was guilty of inappropriate marital conduct and adultery; (4) Husband earned $1.3 million in 2007 working as an attorney in a private practice, but that, prior to trial, he accepted a lesser paying job; (5) Husband was "so untruthful as to not be believed under oath"; (6) that "there [wa]s no legitimate reason...for [Husband] to voluntarily reduce his earning capacity"; and (7) Husband earned more income in 2008 than he originally reported to the court because of income "he continue[d] to generate from his private practice." Judgment in accordance with the findings was not entered at that time.

On January 30, 2009, the trial court entered a Final Decree of Divorce, which incorporated the Findings of Fact, a Permanent Parenting Plan, and a child support worksheet. The decree awarded Wife an absolute divorce on the grounds of adultery and inappropriate marital conduct and dismissed Husband's counter-complaint. The decree also held that: (1) Husband was not a credible witness, was untruthful, and could not be believed under oath and the court did not credit his testimony; (2) Husband was "blatantly untruthful

with regard to the listing of his income...and Husband was untruthful in failing to disclose the additional income he generated from January 1, 2008 until July 17, 2008, which amounted to an additional $250,000"; (3) Husband "lack[ed] character and credibility with regard to his violations of this Court's statutory Restraining Order"; (4) Wife was a credible witness; (5) Husband's "position with regard to his loss of banking business and other business [from his private practice] because of the results of the Sarbanes-Oxley Act [wa]s not supported by the evidence"; (6) Husband "ha[d] intentionally reduced his income and...his decision to take a lower paying job...for $150,000 gross per year [wa]s not reasonable and was not done in good faith" and Husband's "earning capacity [wa]s $500,000 gross per year and the Court...impute[d] this income to [Husband]"; and (7) Husband violated the restraining order by purchasing an automobile, by selling it and purchasing another car, and by attempting to purchase a home for himself.

The trial court then divided the marital assets and made the following findings and rulings: (1) Wife was "economically disadvantaged relative to [Husband] and...cannot reasonable [sic] be rehabilitated and, therefore,...is entitled to the payment of alimony *in futuro*"; (2) Wife "can be employed as a nurse, but she must have intense refresher courses because her field [wa]s in nursing and she ha[d] not practiced in her field for over twenty-one years"; (3) Wife would be able to earn $3,000.00 per month "in a year's time after proper schooling for the first year"; (4) Husband "shall pay [Wife] $11,000 per month as long as she ha[d] the home mortgage to pay" and "after the home ha[d] been sold, [Husband] will pay to [Wife], as alimony *in futuro*, $6,500 per month until [Wife's] death or remarriage, or until the death of [Husband]"; (5) Husband shall pay for all expenses of Wife's nursing refresher courses; (6) Husband shall pay Wife's uncovered medical and dental expenses until Wife was employed full-time; (7) Wife's parenting plan was adopted, with some exceptions; (8) the previously entered pendente lite order concerning Husband's parenting time was continued; (9) Husband's girlfriend "shall not be allowed to be around the parties' minor daughter"; (10) Husband shall pay the private school tuition and all other expenses associated with private school; (11) for purposes of calculating child support, Husband's income was $41,666.67 per month and Wife's was $6,500.00 per month; (12) Husband shall pay all uncovered medical and dental expenses for the child; and (13) based upon Wife's needs and Husband's ability to pay, "the payment of [Wife's] attorney's fees and expenses shall be paid by [Husband] in the amount of $98,125.16...and the payment...shall be considered alimony for all purposes."

Husband filed a Notice of Appeal and a Motion for Stay on February 6, 2009. On February 26, Husband filed a Motion to Alter or Amend, raising a number of issues with the trial court's actions. On March 18, Husband filed a First Amended Notice of Appeal. On May 12, the trial court entered separate orders, denying Husband's Motion to Alter or Amend and Motion for Stay.[1]

[1] Husband filed a motion for a partial stay pending appeal pursuant to Rule 7, Tenn. R. App. P., to (continued...)

II. Statement of the Issues

Husband raises the following issues:

1. Whether the trial court's post-judgment modification of the final decree to give it retroactive effect *nunc pro tunc* was proper.

2. Whether the trial court's credibility determination should be reversed.

3. Whether the trial court's decisions as to spousal support should be reversed as a result of error in:
   (a) determining that Husband was voluntarily underemployed
   (b) determining Wife's earning capacity
   (c) determining that Wife was economically disadvantaged
   (d) determining that Wife was entitled to alimony in futuro

4. Whether the property division should be reversed.

5. Whether the trial court properly decided issues relating to the parenting plan and child support.[2]

6. Whether the award of divorce on grounds of adultery should be reversed.

7. Whether the award of attorney's fees should be reversed.

8. Whether the trial court should be recused from further proceedings in this matter.

Wife raises the following issue:

1. Whether the Wife is entitled to attorney's fees incurred on appeal.

---

[1](...continued)
which Wife filed a response in opposition. On March 26, 2009, this Court granted the motion, *inter alia,* staying Husband's spousal support to the extent it exceeded $2,100.00 per month, all retroactive support, and the payment of Wife's attorneys' fees.

[2] Specifically, Husband's issues include a challenge to the amount of child support awarded, the Parenting Plan's alleged punitive and inappropriate provisions, and the restraint against Husband's girlfriend.

III. Analysis

A. Spousal Support

The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007) (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). In determining the propriety, nature, and amount of an alimony award, courts are to consider the statutory factors enumerated in Tenn. Code Ann. § 36-5-121. While a trial court should consider all the relevant factors under the circumstances, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson,* 76 S.W.3d 337, 342 (Tenn. 2002)); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Riggs*, 250 S.W.3d at 457 (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). Appellate courts will not alter such awards absent an abuse of discretion. *Id*. Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

1. Determination of Earning Capacities

Husband contends that the evidence in the record supports a finding that he was not voluntarily underemployed and that the trial court erred in setting his earning capacity for purposes of spousal and child support at $500,000.00 per year. He also contends that Wife's earning capacity should be set at $88,000.00 per year.

a. Husband's Voluntary Underemployment

The trial court found that Husband was voluntarily underemployed and that, as a result, he had "intentionally reduced his earning capacity to $150,000.00." The court found that the decision to take a lower paying position at Stites & Harbison "[wa]s not reasonable and was not done in good faith considering all the facts and circumstances of this case."

"Willful and voluntary underemployment can impact the amount of...alimony to be paid" since "[t]he statute governing alimony specifically refers to 'earning capacity,' as opposed to actual earnings." *Lightfoot v. Lightfoot*, No. E2001-106-COA-R3-CV, 2001 WL 1173297, at *6 (Tenn. Ct. App. Oct. 4, 2001) (citing Tenn. Code Ann. § 36-5-101(d)(1)(A)

(2001)).[3] "In making its determination, the trial court must consider the party's past and present employment and whether the party's choice to accept a lower paying job was reasonable and made in good faith." *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001). "Whether a party is willfully and voluntarily underemployed is a fact question, and the trial court has considerable discretion in its determination." *Id*. at 738. Since this is a factual question, we accord the trial court's findings of underemployment "a presumption of correctness, unless the preponderance of the evidence is otherwise." *Id*. at 737-38; Tenn. R. App. P. 13(d).

With respect to his employment, Husband testified that he had developed a specialty in doing the securities work for start-up banks or "existing banks that had enough shareholders that they fell under the FCC laws and had to start filing reports quarterly and special reports and so forth." According to Husband, in 2002, the federal Sarbanes-Oxley Act was enacted, which established a "new accounting governing body" responsible for regulating the industry. Husband testified that he lost clients because it was too expensive for them to comply with the new regulations and that, as a result, his "existing clients...that could get out of the system went private" and his "biggest business, [his] most sophisticated client...signed a deal to be purchased by [a larger bank]." As a consequence of the loss of clients, he closed his practice at the end of 2007 and began work at Stites & Harbison, a firm with which he was previously affiliated.

On cross examination, Husband testified that he did not "interview with anybody else but Stites & Harbison," that Stites & Harbison was his "first choice," and that he "didn't look into any other way to make any other more money [sic] than to go back to...Stites & Harbison at 150,000 a year [sic]." Husband maintained that his earning capacity for 2008 was $150,000.00, but admitted that he did not know what his income would be for 2009.

We find that, although some facts upon which the court based its determination are not supported, taken as a whole the record does not preponderate against the trial court's finding that Husband was voluntarily underemployed. Husband's testimony regarding the effect of the Sarbanes-Oxley Act on his practice, while plausible, did not persuade the trial court that Husband's closing of his firm was necessary. Husband's uncontradicted testimony,

---

[3] In 2005, the statutory language cited by *Lightfoot* was deleted from Tenn. Code Ann. § 36-5-101 and was recodified at Tenn. Code Ann. § 36-5-121(i), which states, in part pertinent, that:

> (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including: (1) The relative *earning capacity*, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources. . . .

(Emphasis added).

however, was that, at the time he made the decision to close his practice, his long standing banking clients were no longer in need of his services and, as a consequence, he was facing the loss of his client base; the income figures for his practice supported his testimony in this regard. The record does not support the conclusion that Husband "intentionally chose to abandon his work," as found by the trial court, and we cannot conclude that Husband's motivation for closing his office and securing employment with Stites & Harbison was to decrease his income and thereby reduce his potential alimony and child support. The fact that Husband did not seek opportunities other than employment with Stites & Harbison or explore more fully the employment market for an attorney of his experience, however, bears significantly on the critical inquiries of reasonableness and good faith in accepting his current employment.[4] The record does not reflect a plausible explanation for Husband's failure to more fully "test the waters" and the trial court was in a better position to evaluate the subtleties of Husband's testimony in that regard. According the trial court's finding the presumption of correctness, we affirm the determination that Husband was voluntarily underemployed.

b. Husband's Earning Capacity

The evidence, however, preponderates against the trial court's imputation of an earning capacity to Husband of $500,000.00 per year. The trial court does not explain its basis for imputing this amount and we find no evidence in the record to support it.

"Determining...what a [parties'] potential income would be [is] a question[] of fact that require[s] careful consideration of all the attendant circumstances." *Richardson v. Spanos*, 189 S.W.3d 720, 726 (Tenn. Ct. App. 2005). The best evidence of Husband's earning capacity was his prior years' annual earnings as reflected in his tax information. *See Brooks v. Brooks*, 922 S.W.2d 403, 407 (Tenn. 1999) (holding that "since the record in this case contained [father's] tax returns for the years 1991, 1992, 1993, 1994, and 1995, the Court of Appeals erred in concluding that reliable evidence of [father's] earning potential was not in the record."). Also, while not relied upon by the court in this case, Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II) provides that, in imputing income for child support purposes:

[4] We have reviewed Husband's employment agreement with Stites & Harbison which reflects that, in addition to the salary, Husband received insurance and other benefits. His new firm also assumed financial responsibility for Husband's unexpired office and copier leases as well as agreed to employ Husband's associate, law clerk and secretary. While this was certainly an advantageous opportunity for Husband, we cannot assume that other opportunities were not available to him. In this regard, we note that Husband's expertise in banking law and regulation might lend itself to employment or appointment outside of the traditional practice of law.

> [A]dditional income can be allocated to [a] parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:
>
> I. The parent's past and present employment; and
>
> II. The parent's education and training.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II).

Husband obtained his undergraduate degree from Harvard University and law degree from Vanderbilt University Law School. After obtaining his law license in 1978, Husband worked at a law firm, as in-house counsel at a bank, and at another law firm before opening his private practice. Husband introduced into evidence a document containing his tax information, which revealed that his "Total Business Income" was $326,375.00 for 2002; $347,818.00 for 2003; $212,163.00 for 2004; $309,749.00 for 2005; $427,730.00 for 2006; and $1,124,704.00 for 2007. He explained that the unusually large amount of income earned in 2007 was because "the SEC kept extending the deadline for little company compliance" with the Sarbanes-Oxley Act "until December of 2007...[s]o they had to get out of the system by the end of the year...That's why this year was such a big rush."

The testimony of Kathryn Edge and Jason Riccardi was in accord with Husband's testimony regarding the impact of the Sarbanes-Oxley Act, specifically, that, as a result of the Act, existing small banks were consolidating or closing and new small banks were not being formed. Ms. Edge, a former deputy commissioner with the Tennessee Department of Financial Institutions who, at the time of trial, was an instructor in banking law at the Nashville School of Law and engaged in private practice focused on banking matters, testified not only as to the specific impact of the Sarbanes-Oxley Act on the banking industry but also that banking was in a "state of flux" and that the industry was "cyclical like many other areas of the economy." Mr. Riccardi, an accountant who worked with Husband on several banking matters, likewise testified that he had lost clients as a result of recent bank mergers.[5] In addition, Husband introduced without objection a record detailing the banking clients he lost as a result of the client's mergers, acquisitions or going private, in the years immediately prior to 2007; he reported that income lost was $1,404,945.40. Husband testified that he was hopeful, but not sure, that he could increase his income above the base

[5] Wife's counsel challenged the testimony of Ms. Edge and Mr. Riccardi; the trial court decided, without ruling on a specific objection, to disregard the proof but allowed Husband's counsel to continue the examinations. Upon a review of the testimony of these witnesses, we find that their testimony was relevant and properly admissible.

salary of $150,000.00 at Stites & Harbison; he did not say how. Ms. Edge testified that a new salaried partner who came to her firm without a client base could expect a salary in the $150,000.00 - $200,000.00 range.

Based upon the foregoing, we determine that Husband's earning capacity, for purposes of setting spousal and child support, should be $250,000.00. In reaching this finding, we have taken the difference between Husband's $150,000.00 salary and his average salary for the years 2002-2006 (excluding 2004 and 2007) of $352,000.00.[6]

c. Wife's Earning Capacity

Husband asserts that the trial court's finding that Wife could earn $36,000.00 per year was "based solely on arguments of [Wife's] counsel" and that "[t]here was absolutely no evidence in the record to support these findings." He argues that the record contains "expert testimony to the effect that [Wife] could be hired as a nursing instructor at a salary of $88,000 per year without re-training" and that Wife "did not present any testimony to the contrary." Wife contends that the trial court did not err in finding that she could earn $3,000.00 per month, but cites no evidence to support this finding. Rather, she challenges the expert testimony introduced by Husband that she could earn more.

Husband called Michele Jarrett as a witness, who testified that she had worked in the health care placement industry for the past 11 years.[7] Ms. Jarrett testified that, in reviewing Wife's deposition testimony, she learned that Wife held "[a] master's in nursing, . . .had been in management as a[n] [assistant] director of nursing, and also in education"; that "there[] [was] a humongous nursing shortage" due to a "lack of nursing instructors"; and that Wife "would be an excellent instructor." She stated that, for "nurses that ha[d] been out of the field for long periods of time," "they would get some type of correspondence or refresher as to what the course they would be responsible for teaching" and that "as long as their nursing license was active, they would be able to jump right in." Ms. Jarrett testified that Wife's nursing license was active and that she had found a number of jobs "within a 20-mile radius that [were] available that [Wife] could go to work at almost immediately." Ms. Jarrett testified that "with a master's of nursing and [her] experience," Wife could earn "[m]inimally $65,000 a year," but that, of the "two positions that [were] available for a nursing instructor, one [wa]s for $80,000 a year and one [wa]s for $88,000 a year." She stated that Wife's age would not be a "barrier for her having a career in nursing" and that "the average age of

---

[6] We acknowledge that an individual with a varying yearly income is prone to unusually high and low annual earnings. Therefore, we find it appropriate in determining Husband's prior average annual salary, to disregard the highest and lowest yearly earning and average the remainder.

[7] Wife does not contest Husband's designation of Ms. Jarrett as an expert in the health care placement field.

nurses in the education field is in the 50s." Ms. Jarrett also addressed non-teaching jobs, in which Wife could obtain sedentary employment with a hospital or insurance company "reviewing patient charts and developing a plan of care." She stated that "[w]ith her master's degree, [Wife] should not accept anything less than $65,000 a year."

In its Findings of Fact, the trial court found that Wife "received her college degree," "went to graduate school...and finished one year later with a Masters Degree in Nursing," and "ha[d] not worked outside the home since 1987, 19 years." In the final decree, the court stated that Wife "can be employed as a nurse, but she must have intense refresher courses because her field is in nursing and she has not practiced in her field in over twenty-one (21) years," that "nursing is a dynamic field and in constant flux," and that Wife "would be able to earn an income in the range of $3,000.00 per month in a year's time after proper schooling for the first year."

Upon a review of the record, we find that the evidence preponderates against the trial court's finding that Wife had an earning capacity of only $36,000.00 per year. As stated earlier, a parties' potential income is a question of fact, *Richardson*, 189 S.W.3d at 726, and Wife presented no evidence at trial to support an earning capacity of $36,000.00 per year. The only references in the record that discuss this amount is Wife's Proposed Findings of Fact and Conclusions of Law[8] and her counsel's closing argument; however, "[s]tatements and arguments of counsel made during the course of a hearing are not evidence." *Wilson v. Americare Sys. Inc.*, No. M2008-00419-COA-R3-CV, 2009 WL 890870, at *6 (Tenn. Ct. App. Mar. 31, 2009). Husband, on the other hand, presented expert testimony that, with her education and work experience, Wife could return to work as an nursing instructor or in a more sedentary position with an insurance carrier. Wife presented no contradictory evidence nor did she submit proof that Ms. Jarrett's testimony was faulty because she failed to interview Wife or consider her family, physical, and financial situations.[9] Consequently, we find that Wife has an earning capacity of $65,000.00 per year. In so holding, we have taken into account Wife's long term absence from the nursing profession, as well as the need to attend a refresher course to increase her expected income, and have determined that her earning capacity should be the minimum salary reflected in the record for a person of her qualifications for purposes of determining appropriate support.

---

[8] In her Proposing Findings of Fact and Conclusions of Law, Wife stated that she "may have an earning capacity in the range of $35,000.00 to $40,000.00."

[9] On cross-examination, Ms. Jarrett testified that, prior to searching for available nursing positions, she did not interview Wife or conduct a reference check and that she was not aware of Wife's physical limitations, family obligations, or financial situation. Ms. Jarrett stated that she performs "initial scans of people's information and credentials without ever speaking to them and typically identif[ies] several different opportunities for them based on a summary of their qualifications." She stated that she was not "interviewing [Wife] for a position," but was "simply stating that [Wife] would be easily placed as a nurse."

2. Type of Alimony Awarded

The trial court found that "the parties agreed that [Wife] would stay at home and take care of the parties' children and that [Husband] would continue to work," that Wife "clearly subordinated her career for the benefit of the family, and was the primary caretaker of the parties' children," and that, "without the payment of alimony *in futuro*, it [wa]s not reasonable to expect [Wife]...to achieve, with reasonable effort, an earning capacity that will permit her standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or the post-divorce standard of living expected to be available to [Husband]."

Husband asserts that the trial court erred in awarding Wife alimony *in futuro* because the evidence does not support the conclusion that Wife could not be rehabilitated since "she is not medically disabled and...she holds a master's degree in nursing and a current nursing license." Husband also contends that an award of alimony *in futuro* would "rob [Wife] of any motivation to attain self-sufficiency" since, at the time of trial, she "had not completed a resume, not applied for a job, and had no idea what she could earn."

"Tennessee law recognizes several separate classes of spousal support, including long-term spousal support (alimony *in futuro*), alimony *in solido*, rehabilitative spousal support, and transitional spousal support." *Riggs*, 250 S.W.3d at 456 (internal footnotes omitted). The statutory preference in Tennessee is that "a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, whenever possible, by the granting of an order for payment of rehabilitative alimony." Tenn. Code Ann. § 36-5-121(d)(2). "Where there is a relative economic disadvantage and rehabilitation is not feasible, in consideration of all relevant factors, the court may grant an order for payment of support and maintenance on a long-term basis or until death or remarriage of the recipient." Tenn. Code Ann. § 36-5-121(d)(3). "An award of alimony in futuro may be made, either in addition to an award of rehabilitative alimony, where a spouse may be only partially rehabilitated, or instead of an award of rehabilitative alimony, where rehabilitation is not feasible." Tenn. Code Ann. § 36-5-121(d)(4). "Rehabilitated" is defined as:

> [T]o achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Id.

Husband relies upon this Court's opinion in *Riggs v. Riggs*, 250 S.W.3d 453 (Tenn. Ct. App. 2007) to support his contention that an award of alimony *in futuro* was inappropriate. In *Riggs*, the trial court awarded alimony *in futuro* to wife because she had "absolutely no ability to earn income." *Id*. at 457. On appeal, this Court found that the situation "d[id] not call for long-term alimony" since wife had a real estate license and some business experience. *Id*. at 457, 459. The matter was remanded to the trial court for a determination of a reasonable award of rehabilitative and/or transitional alimony. *Id*. at 458.

Wife cites to a number of cases in which a disadvantaged spouse was awarded alimony *in futuro*, despite that spouse's ability to earn income, to ensure the spouse maintained a standard of living comparable to that enjoyed prior to the divorce. In *Goodman v. Goodman*, No. M2004-02781-COA-R3-CV, 2006 WL 47359 (Tenn. Ct. App. Jan. 9, 2006), the trial court awarded wife alimony *in futuro* based on the finding that "the parties ha[d] enjoyed a high standard of living and the [w]ife c[ould not] be rehabilitated to the standard the parties ha[d] enjoyed during the marriage." *Id*. at *1. With regard to its decision to award alimony *in futuro*, the court considered the length of the marriage, husband's income, wife's income, wife's contribution to husband's occupation and as a mother and homemaker, and the fault of the parties in causing the divorce. *Id*. On appeal, this Court affirmed the award of alimony *in futuro* because "the trial court...properly applied the relevant statutory factors." *Id*. at *7; *see also Carpenter v. Carpenter*, No. W2007-00992-COA-R3-CV, 2008 WL 5424082, at *13 (Tenn. Ct. App. Dec. 31, 2008) (affirming an award of alimony *in futuro* to wife because, "while [w]ife's income may be 'reasonably good,' it is far below that of [h]usband and would not support a standard of living reasonably close to that which the parties enjoyed during their long marriage.").

In the present matter, the parties had been married for 19 years; Husband has an earning capacity of $250,000.00 per year, while Wife is currently unemployed; after the birth of their children, Wife stopped working to stay at home; while Husband's income fluctuated from year to year, he enjoyed average annual earnings of $324,767.00 for the six years immediately preceding the year of divorce. Husband concedes that he was at fault for causing the divorce.[10]

The court found that, with the assistance of a refresher course, Wife could be employed as a nurse. Ms. Jarrett, who offered the only testimony relating to Wife's potential earnings, testified that the minimum salary for a nurse with a master's degree and Wife's experience was $65,000.00 per year, with the potential that, if Wife chose to become a nursing instructor, she could earn between $80,000.00 and $88,000.00. Even if she were able to earn $88,000.00 as a nursing instructor, Wife's standard of living would be below the

[10] The trial court awarded Wife a divorce on the grounds of inappropriate marital conduct and adultery. While Husband challenges the court's award on the ground of adultery, which will be discussed in further detail, *infra*, Husband does not challenge the ground of inappropriate marital conduct.

standard she enjoyed during the marriage and less than the standard Husband will enjoy after the marriage. Consequently, we affirm the decision of the trial court to award alimony *in futuro.* We find it necessary, however, to remand for reconsideration the amount of alimony *in futuro* awarded. The amount of the award should be based upon Husband's earning capacity of $250,000.00 per year and Wife's earning capacity of $65,000.00 per year.

In addition, while the trial court ordered Husband to pay the expenses associated with Wife's nursing refresher courses, the order is vague and unlimited as to the nature, duration and expense of the courses for which Husband is to be responsible. Moreover, it does not appear that the court took into consideration Wife's taking the refresher course in its determination of the amount of alimony *in futuro.* We affirm the finding that Wife can be rehabilitated but reverse the award of rehabilitative alimony, as stated in the order. On remand, the court is directed to provide a specific dollar amount and duration of such award and, as necessary, consider the extent to which the award of alimony *in futuro* is subject to modification based on Wife's rehabilitation. *See* Tenn. Code Ann. § 36-5-121(d)(2) & (d)(4).

3. Attorney's Fees

An award of attorneys' fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, No. E2006-01885-COA-R3-CV, 2007 WL 3171132, at *7 (Tenn. Ct. App. Oct. 30, 2007) (citing *Herrera v. Herrera,* 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). When determining whether to award attorney's fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). *See Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711, at *7 (Tenn. Ct. App. June 19, 2007). Because awards of attorney's fees are within the sound discretion of the trial court, we will not disturb the award on appeal absent an abuse of discretion. *Anzalone*, 2007 WL 3171132, at *7 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002)).

In awarding attorney's fees to Wife, the court stated:

> The Court concludes that the statements in the affidavit of Michael W. Binkley for attorney's fees and expenses are reasonable and the fees and expenses charged for the activities listed in the bill are reasonable. The Court further concludes based upon [Wife's] needs and [Husband's] ability to pay as well as other factors that the payment of attorney's fees and expenses shall be paid by [Husband] in the amount of $98,125.16...and the payment...shall be considered alimony for all purposes.

Husband asserts that the trial court erred in awarding Wife her attorney's fees because she "has more ability to pay the attorney's fees than does [Husband]" since she "has over $220,000 in separate assets" and the discrepancy between Husband's and Wife's annual

income is only $150,000.00 and $88,000.00, respectively.[11] Wife contends that the court did not err in awarding her attorney's fees because Husband has the ability to pay and she is economically disadvantaged.

Taking into account the factors listed in Tenn. Code Ann. § 36-5-121(i), Wife's need, and Husband's ability to pay, we find that the trial court did not abuse its discretion in awarding Wife attorney's fees as alimony *in solido*. We find it necessary, however, to remand the issue of the amount to be awarded for reconsideration.

The record is not clear that the court considered the objections submitted by Husband to the fee request in its determination to award the full amount sought. The record shows that Wife's counsel filed a motion seeking an award of fees on September 19, 2008 and filed his billing records in support thereof on October 23. The court included the award of $98,125.16 in its Findings of Fact filed on October 29, 2008 and recited that the amount "shall be a judgment for which execution shall issue." On November 4, however, the parties entered into an agreed order establishing a process for resolution of the application; the order provided, *inter alia,* the following:

> . . . counsel for the Husband shall within (5) days of entry of this Order file written objections to the Motion, and that counsel for the Wife shall within five (5) days of entry of Husband's written objections to the Motion file his own response to the objections, all of which the Court shall consider in rendering any decision with regard to such fees, ...

Husband filed a timely response in opposition to the award challenging the request as being unreasonable and excessive.

The final decree does not recite that the court considered Husband's response or otherwise entered a separate order in accordance with the procedure set forth in the agreed order. In light of the short period of time between the submission of the billing records and the entry of the Findings of Fact, as well as the fact that the "judgment" for the attorneys fees was entered before Husband responded to the application, we have no assurance that the court afforded the parties the complete consideration of this matter to which each was

[11] Husband also contends that "it is unfair to require him to reimburse [Wife] for attorney's fees, the purpose of which was to advance claims that were not supported by evidence and which cost [Husband] an equivalent, if not greater, amount of effort to have reversed." Husband cites to no authority in support of this contention and makes no references to the record regarding the alleged unsupported claims advanced by Wife.

entitled.[12] On remand, in its determination of a reasonable fee, the court should specifically address Husband's objections.

In addition, while the court, in its Findings of Fact, detailed Wife's need for alimony *in solido*, it did not explain the basis of its determination that Husband had the ability to pay the entire amount sought or detail the "other factors" it relied upon in making the award. To the extent the determination was based on Husband's earning capacity as found by the court, the issue of the amount of fees to be awarded must be reconsidered in light of our finding of Husband's earning capacity.

B. Property Division

Husband asserts that, while "the trial court's division of [marital] property appears equitable," "over $600,000 of the assets purportedly awarded to [him] are phantom assets" because they are "either grossly overvalued, did not exist, or were not marital assets in the first place." Husband also contends that the property division was inequitable because the trial court "require[d] [him] to pay 100% of the marital debts."

All real and personal property acquired by either party during the course of the marriage and owned by either or both spouses is classified as marital property, which the court is obliged to equitably divide. Tenn. Code Ann. § 36-4-121(b)(1)(A). The division of marital property is governed by a list of statutory factors set forth at Tenn. Code Ann. § 36-4-121(C). Marital property is to be "valued as of a date as near as reasonably possible to the final divorce hearing date." Tenn. Code Ann. § 36-4-121(b)(1)(A). "The value of a marital asset is determined by considering all relevant evidence regarding value." *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). "The burden is on the parties to produce competent evidence of value, and the parties are bound by the evidence they present." *Id*. "[T]he trial court, in its discretion, is free to place a value on a marital assets that is within the range of the evidence submitted." *Id*. "The value of marital property is a fact question." *Id*. "Thus, a trial court's decision with regard to the value of a marital asset will be given great weight on appeal" and "will be presumed to be correct unless the evidence preponderates otherwise." *Id*.

[12] We note that the final decree was prepared by Wife's counsel and bears a filing date and time of January 30, 2009 at 8:29 a.m.; the decree reflects that it was signed by the court on that date. While we do not find fault with the court requesting counsel to prepare the final decree, it does not appear that the court made an independent review of the application, and Husband's objections thereto, prior to entering the final decree. Indeed, the transcript of the January 30 hearing reveals that the final decree was entered prior to the hearing and that, while the court acknowledges that Husband filed a response to the application, no argument was held relative thereto. The order entered after the hearing likewise fails to recite that Husband's objections were considered.

We find that the trial court erred in its valuation of certain marital assets and that, as a consequence, the division of marital property was inequitable; consequently, we reverse same and remand this issue for reconsideration.

1. Husband's Closed Law Practice

The trial court found that the "equity" in Husband's closed practice was $566,433.00, which included $314,965.00 cash in bank accounts as of March 31, 2008, $15,000.00 in "Hard Assets," $250,000.00 in accounts receivable as of December 31, 2007, and $13,532.31 in long term debt.[13] Husband asserts that the trial court erred "by valuing [his] closed practice at $566,433, when the only proof in the record was that the residual value of the closed practice at the time of trial was only $8,761." Specifically, Husband challenges the trial court's findings (1) regarding his practice account balance and (2) the amount of accounts receivable.[14]

a. Bank Account

Husband argues that his practice account bank statements "showed that although the account had [a] balance [of $314,965.00] as of March 31, 2008, the balance as of the second day of trial on July 17, 2008 was only $7,216.01"[15] and that "[t]here is no explanation, and no justification, for the trial court using the earlier $314,965 balance when the bank statements and [Husband's] undisputed testimony was that the money had been spent on taxes, support and marital debts."[16] Husband maintains that the trial court should have valued the bank account as of July 2008, and not March 2008, in accordance with Tenn. Code Ann. § 36-4-121(b)(1)(A).

---

[13] Neither party contends that Husband's practice was not marital property pursuant to Tenn. Code Ann. § 36-4-121(b)(1)(A).

[14] Husband also asserts that Wife failed to produce evidence "for the purpose of valuing [his] closed practice" and, therefore, the court should have accepted his "un-rebutted testimony that the value of his closed practice was only $8,761." As will be discussed below, Husband admits that the value found by the trial court was evidenced in bank statements he submitted at trial and, therefore, since the trial court's valuation of Husband's business was based on proof at trial, we find Wife's failure to produce evidence on the matter to be irrelevant.

[15] Husband introduced the bank statements from his practice, which revealed that the account balance as of March 31, 2008 was $314,964.94 and the balance as of June 30, 2008 was $7,216.01.

[16] Husband testified that the reason for the depletion of the account funds was to pay taxes to the IRS in the amount of $331,000.00 in April 2008. The bank statements confirm that, in April 2008, Husband wrote two checks for $271,000.00 and $60,000.00.

Wife asserts that the trial court was not required to accept the value of the bank account as near to the final divorce hearing date because the court "believed that the Husband manipulated his income to avoid financial obligations to his Wife and child" and "chose the Husband's March 31, 2008 Operating Account bank statement as the most reasonable source of information to value the Husband's law practice."

While we acknowledge that trial courts have the discretion to set a value to marital assets "within the range of evidence submitted," Tenn. Code Ann. § 36-4-121(b)(1)(A) requires a court to consider the value of an asset "as near as reasonably possible to the final divorce hearing date." In the present situation, the balance of the bank account as of June 30, 2008 was evidence of the value of the account closest to the final hearing date. While Husband's actions in depleting the bank account can be considered in setting the value of the account, *Edgemon v. Edgemon*, No. E2006-00358-COA-R3-CV, 2007 WL 1227467, at *8 (Tenn. Ct. App. April 26, 2007),[17] Wife failed to present evidence in support of such conduct and the trial court does not state that it set the account balance as of March 2008 for this reason. In the absence of evidence of improper conduct on the part of Husband, we find that the court's valuation of the account as of March 30, 2008, was contrary to the instruction of the statute and the account should have been valued as of July 17, 2008.

b. Accounts Receivable

Husband asserts that the trial court erred in finding that his practice "possessed $250,000 in uncollected receivables" since "[t]he only proof in the record was that as of the date of trial there were **no** outstanding receivables of any value." (Emphasis in original). Wife does not address this issue in her brief on appeal.

On cross-examination, Wife's counsel questioned Husband regarding the practice's accounts receivable in the following colloquy:

---

[17] In *Edgemon*, the trial court valued the parties' joint bank account as of the date of their separation, rather than as of the date of divorce. *Edgemon*, 2007 WL 1227467, at *7. In affirming the court's decision, this Court held that:

> [g]iven the fact that [w]ife contributed a substantial amount of money to the joint account, that [h]usband depleted the account's funds following the parties' separation, and that the account was no longer in existence at the time of the divorce hearing, we hold that the trial court was well within its discretion in addressing the value of the joint account around the time of the of the [sic] parties' separation and factoring in the use of those funds as a part of its reasoning in determining an equitable division.

Id. at *8.

Q. Well, let me ask you this. . .You're still receiving receivables on money earned in 2007. Right?
A. I am not.
Q. You're not receiving any?
A. I'm not receiving any.
Q. So you're telling this court that you jammed all of your receivables as much as you could into the month of December 2007, and you're not receiving any more of those. Is that right?
A. No, sir. I collected money during 2008. But to the best of my knowledge, all of my receivables that are going to be paid have been paid.

The trial court included in its valuation of Husband's practice $250,000.00 in accounts receivable existing on December 31, 2007. While Husband admitted that there were $250,000.00 in receivables on that date, he testified that these receivables were collected in the beginning of 2008 and that there were no additional outstanding receivables at the time of trial. Wife provided no contradictory proof. As stated earlier, marital property is to be "valued as of a date as near as reasonably possible to the final divorce hearing date." Tenn. Code Ann. § 36-4-121(b)(1)(A). We find that the trial court erred by including the accounts receivable as of December 31, 2007 in the valuation of Husband's practice.

2. Award of Automobile

The court found that Husband "intentionally violated [the] Restraining Order by voluntarily purchasing a Honda automobile for $13,000.00" and stated that it took that finding, among others, into consideration "with regard to the value and the division of the parties' assets." The trial court then awarded Husband a Honda S20 CV, valued at $12,375.00, as part of the property division.

Husband asserts that "there was no basis for treating th[e] automobile as a marital asset" since "[t]he undisputed testimony at trial was that this car had been sold and the proceeds deposited into [Husband's] operating account which was included in the marital assets." In support of this assertion, Husband cites to his testimony that he sold the car in April of 2008 for $8,250.00 and to his bank statement, which shows that a deposit of $8,250.00 was made on April 24, 2008. Wife asserts that "th[e] vehicle was purchased in violation of the Temporary Restraining Order with marital funds and sold at a loss of over Seven Thousand Dollars." Wife makes no argument as to how these facts support the trial court's award of the Honda to Husband.

"The trial court is only authorized to divide marital property that actually exists at the time of divorce, and 'it cannot create assets that do not exist.'" *Marciante v. Perry*, No. 32006-02654-COA-R3-CV, 2008 WL 820502, at *7 (Tenn. Ct. App. Mar. 26, 2008) (quoting *Gratton v. Gratton*, No. M2004-01964-COA-R3-CV, 2006 WL 794883, at *8 (Tenn. Ct.

App. Mar. 28, 2006)). "Property that was once owned by a spouse, either as separate or marital property, but not owned at the time of divorce, is not subject to classification or distribution because a court cannot divide or distribute what is 'not there.'" *Id*. (quoting *Brock v. Brock*, 941 S.W.2d 896, 900 (Tenn. Ct. App. 1996)).

We find that the trial court erred in awarding Husband the Honda since it was not among the marital property at the time of the divorce. Husband's alleged violation of the Temporary Restraining Order does not allow for the award of an asset not part of the marital estate to be included in the division of marital property.[18]

3. First Vision Bank Stock

Husband asserts that the trial court erred in awarding him 2,500 shares of stock in First Vision Bank because the stock was included in the Morgan Keegan profit sharing plan and that, as a consequence, he received $30,000.00 less than reflected in the final decree.[19] In his motion to alter or amend Husband asserted that the First Vision Bank stock was part of the profit sharing plan; he also filed an affidavit in support of the motion for stay filed in the trial court stating that the First Vison Bank stock awarded to him was the same as that included in the profit sharing plan. Wife did not respond to Husband's contention or proof in this regard and the court did not address it in ruling on either motion.

We are unable to completely resolve this issue. While the record shows that there were a total of 2,500 shares of First Vision Bank stock, the record also shows that the stock is one of the assets included in the profit sharing plan. Further, it is not clear which party was awarded this stock, since the final decree awards the stock to Husband and awards the Morgan Keegan profit sharing plan to Wife. In the absence of clarity as to whom this stock was awarded, we cannot review Husband's larger contention that the division of marital property was inequitable. On remand, the court is directed to clarify to whom the First Vision Bank stock is awarded, to strike any award of the same stock to the other party and, as necessary, redetermine the division of marital property in accordance with its clarification.

---

[18] No motion for relief was filed by Wife for Husband's alleged violation of the temporary restraining order.

[19] In the final decree, the trial court created a chart with five columns: (1) the marital asset item number; (2) the asset; (3) the total "equity" of the asset; (4) the "equity" in the asset awarded to Husband; and (5) the "equity" in the asset awarded to Wife. Item 19 was 2,500 shares of stock in First Vision Bank, which carried an "equity" of $30,000.00 and which was awarded to Husband. Item 24 was a Morgan Keegan & Company, Inc. Profit Sharing Plan, which carried an "equity" of $166,817.00; among the stocks included in the profit sharing plan was "2,500 First Vision Bank." The Final Decree, however, reflects that Wife was awarded the entire "equity" in the profit sharing plan, not Husband, but neither party addresses this discrepancy on appeal.

4. Bank of the South Stock

The trial court found the Bank of the South stock, valued at $25,000.00, to be marital property and awarded same to Husband. Husband asserts that this stock should not have been considered marital property because, "although that stock was titled in his name, he held it as trustee for the grandchildren of a third party, Stephen Maggart" and that he and Mr. Maggart created an oral trust. Husband states that "the effect of this error was to overstate the value of assets awarded to [him] by $25,000."

Husband testified that he received a check for $25,000.00 from Stephen Maggart for the purpose of purchasing 2,500 shares of stock in Bank of the South and that he purchased the stock as "trustee for Mr. Maggart's grandchildren"; Mr. Maggart's check was submitted as an exhibit at trial. On cross-examination, Husband stated that he and Mr. Maggart did not have a "written trust agreement" and that he deposited the check into his "family checking account" before buying the stock.

"A valid trust need not be in writing." *Kopsombut-Myint Buddhist Center v. State Bd. of Equalization*, 728 S.W.2d 327, 333 (Tenn. Ct. App. 1986). A trust "can be created orally unless the language of the written conveyance excludes the existence of a trust." *Id*. The existence of a trust requires proof of three elements: "(1) a trustee who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another, (2) a beneficiary to whom the trustee owes the equitable duties to deal with the trust property for his benefit, and (3) identifiable trust property." *Id*. "[W]hen a party seeks to establish an oral trust, it must do so by greater than a preponderance of the evidence." *Id*.

We find that the evidence does not support Husband's testimony regarding the existence of a trust and that what evidence there is does not preponderate in favor of the existence of a trust. Mr. Maggart's check contains no indication as to the purpose of the exchange and, other than Husband's testimony, there is no evidence to suggest that Husband was serving as a trustee of the stock or that Mr. Maggart's grandchildren were the intended beneficiaries of the stock. In the absence of sufficient evidence supporting the existence of a trust, we find that the court did not err in finding the Bank of the South stock to be marital property.

5. Marital Debt

The trial court found that Wife incurred credit card debt of $18,730.00 and that Husband incurred a loan in the amount of $38,998.00, which was secured by two certificate of deposits. The court ordered Husband to repay the loan and awarded Wife the certificates; the court also ordered Husband to pay Wife's credit card debt.

Husband contends that he should not have to pay the credit card debt because Wife incurred the debt as a result of her "inability to make ends meet on the $11,000 per month being provided to her by [Husband]," that she chose not to ask the court for an order of a higher monthly support obligation, the debt was incurred after the parties separated, and he received no benefit therefrom.[20] He also contends that the court erred in ordering him to fully pay the loan because the proceeds were used to pay the college tuition of one of the parties' children and, consequently, both parties benefitted equally from it.

Wife responds that her monthly expenses were higher than the $11,000.00 provided by Husband and that she was forced to "use her credit card for her and her daughter's expenses" and argues that the court correctly allocated the obligation to Husband because she "lack[ed] the financial means to pay her credit card debt." Wife also contends that, in addition to paying for the college tuition, Husband used $15,000.00 of the loan to "repay himself a 'loan' and for personal expenses"[21] and that she did not benefit from Husband "repaying himself a loan and using proceeds for personal expenses."

"'[M]arital debts' are all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003). "Tennessee courts should use the [following] four factors...as guidelines in the equitable distribution of marital debt: (1) the debt's purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt." *Id*. (citing *Mondelli v. Howard*, 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989)).

Applying these factors, we find that the trial court did not err in ordering Husband to pay Wife's credit card debt. The purpose of the debt was to enable Wife to meet her monthly expenses. While she could have sought an order of temporary support, Husband benefitted

---

[20] Husband does not contest that Wife used the credit card debt to meet her monthly expenses.

[21] On cross-examination, Wife's counsel had the following colloquy with Husband regarding the bank note:

> Q. You encumbered a [Certificate of Deposit]. Correct?
> A. ...I did encumber a CD to pay for my son's - - help pay for my son's college education and pay operating expenses for my law firm.
> ...
> Q. ...And your son's college tuition was 7500 plus 2,000 [sic] for a laptop. Correct?
> A. No. The amount of money that I paid...was in excess of $24,000.
> Q. All right. And then what did you do with the rest of the money?
> A. $10,000 I used to reimburse myself for a loan that I had made to the law firm when we were short of cash. The other 4,000 or $5,000 [sic] I used to pay personal expenses that were then - - that otherwise would have had to come out of my operating account.

by her failure to do so by not having to pay Wife a higher amount than the $11,000.00 to which the parties had agreed. Husband was best able to repay the debt.

We also find that the trial court did not err in ordering Husband to pay the loan since he incurred the debt, benefitted the most from the debt, and was best able to repay the debt. While Wife received some benefit from the loan in that it paid for their child's college tuition, the greater benefit was realized by Husband who, in addition to using a portion of the proceeds to pay the child's college tuition, used $15,000.00 to reimburse himself for the loan made to his practice using marital funds and to pay off personal expenses.

C. Permanent Parenting Plan Order

1. Child Support

Husband challenges the trial court's imputation to him of an earning capacity of $500,000.00 per year for purposes of calculating his child support obligation. In light of our finding regarding the earning capacity of each party for spousal support, the amount of Husband's child support obligation is reversed and the matter remanded for a recalculation based upon Husband's earning capacity of $250,000.00 and Wife's earning capacity of $65,000.00 per year.

2. Parenting Schedule

Appellate courts are reluctant to second-guess a trial court's determination regarding parenting schedules.[22] *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). "Trial courts have broad discretion in devising permanent parenting plans and designating the primary residential parent. In reaching such decisions the courts should consider the unique circumstances of each case." *Burton v. Burton*, No. E2007-02904-COA-R3-CV, 2009 WL 302301, at *1 (Tenn. Ct. App. Feb. 9, 2009) (citing *Parker*, 986 S.W.2d at 563); *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). It is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). Decisions regarding parenting schedules often hinge on subtle factors, such as the parent's demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Thus, a trial court's decision regarding a permanent parenting plan will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id*.

[22] Older decisions from our courts refer to custody or visitation agreements, however, we now refer to such arrangements as parenting plans or parenting schedules; the cases cited, however, remain on point for the substantive law.

The parenting plan adopted by the court continued the parenting schedule that had been set in the agreed *pendente lite* order. At trial, Husband sought additional parenting time, specifically vacation time and rotating holidays; he asserts that the trial court erred by failing to give him the additional time.

In the final decree, the court made factual findings regarding Husband's relationship with the minor child:

> 22. The Court concludes, by [Husband's] own admission, that he gave very little attention to the parties' youngest child in the last few years.
> 23. The Court concludes that the parties daughter is 16 years of age, which is late for [Husband] to try to begin establishing any type of relationship with her.
> 24. The Court concludes that the parties' daughter has been diagnosed with a type of autism.
> 25. The Court concludes that [Husband] admittedly only spent time with the child 2 or 3 times since he left the parties home 2 years ago and has just recently entered into an agreement that gives him every other weekend and one day during the odd week for parenting time.
> 26. The Court concludes that it is not convinced that [Husband] will follow through with the Court's parenting schedule. The Court is not convinced that the amount of child support tempered [Husband's] desire to visit with the parties' minor daughter. Therefore, the Court concludes that it should continue the recent *pendente lite* Order of May 12, 2008 concerning parenting time and allow [Husband] the parenting time with a safeguard that for every majority period of a day that [Husband] fails to exercise his parenting time, [Husband] will owe to [Wife]...$125.00 per parenting time of the 24 hour period and/or $250.00 per weekend....

We hold that the court abused its discretion in its consideration of Husband's request for parenting time above that which had been agreed to with Wife. While the court's findings relative to Husband's lack of attention to the child and failure to visit her are supported by the record, the court's apparent justification for its refusal to extend more time to Husband, i.e., that it was not convinced that Husband would follow through on the parenting schedule, is insufficient to deny the relative modest request for vacation time and rotating holidays. Pursuant to Tenn. Code Ann. § 36-6-101(a)(2)(B), Husband would be compelled to show a substantial and material change of circumstance in order to increase his parenting time if the court's suspicions were unfounded; compliance with the schedule would not satisfy this requirement. "A child's interests are well-served by a custody and visitation arrangement that promotes the development of relationships with both the custodial and the noncustodial parent." *Pizzillo v. Pizzillo*, 888 S.W.2d 749, 755 (Tenn. Ct. App. 1994).

Moreover, we are concerned that the "safeguard" provision included in the court's order is arbitrary and an unreasonable extension of the court's authority. The provision does not allow for any determination of the reason or justification for Husband's failure to exercise his parenting time and it presupposes that financial compensation to Wife is the appropriate remedy for Husband's default, for whatever reason. The authority of the court in this regard is best exercised in accordance with its statutory ability to respond to the exigencies of the particular situation. *See* Tenn. Code Ann. § 36-6-101(a)(1) (A decree for custody and support remains "within the control of the court and [is] subject to such changes or modification as the exigencies of the case may require.").

We remand this issue for reconsideration by the trial court. On remand, the court should consider allowing Husband such additional time as will facilitate the development of daughter's relationship with Husband and which is in the daughter's best interest.

3. Life Insurance

The Permanent Parenting Plan Order stated that "[t]he parties...agree that [Husband's] obligation to maintain life insurance in the face amount of $500,000.00 as set out above, shall continue while the parties' children remain enrolled as full-time college students or until each child attains age 24, whichever event shall occur last." Husband contends that he "does not believe that he can be ordered to maintain life insurance for the child after she ceases to be a minor (or when her graduating class graduates from high school, whichever is later)."

We find that the trial court did not abuse its discretion in ordering Husband to maintain life insurance for the benefit of the minor child. The provision of the Permanent Parenting Plan Order regarding life insurance recited that the "parties...agree[d]" that Husband would maintain a policy for the benefit of the minor child for that time frame. While Husband's *legal* duty to support his daughter ends when she reaches the age of majority,[23] a contractual obligation does not. *See Dorris v. Dorris,* No. 01A-01-9304-CV-00170, 1993 WL 380778 (Tenn. Ct. App. Sept. 29, 1993). In the absence of evidence contrary to the court's finding that Husband agreed to maintain life insurance past the child's reaching the age of majority, we find that the provision is enforceable and that Husband is obligated to abide by the agreement.

[23] "A parent is statutorily required to support his or her child until the child reaches the age of majority or graduates from high school" and then "[o]nce a child reaches the age of majority, there is a complete emancipation of the minor and a parent's legal duty of support ends." *Inzer v. Inzer*, No. M2008-00222-COA-R3-CV, 2009 WL 2263818, at *10 (Tenn. Ct. App. July 28, 2009) (citing Tenn. Code Ann. § 34-1-102(a), (b)).

4. Visitation Restrictions

In regard to Husband's visitation with the minor child, the trial court stated that:

> [T]he parties' minor child has had difficulties with a form of autism that she has recently been diagnosed and that she has been through drastic changes in her life in a very short period of time, from the school that she now attends, to where she may be living in the future. The Court concludes that based upon these events, the child needs to be alleviated from any additional stress and taking into consideration the best interest of the parties' minor daughter, the Court believes that [Husband's] girlfriend shall not be allowed to be around the parties' minor daughter at this time.

Husband contends that the trial court erred by imposing this *sua sponte* restriction and points to the facts that the restriction applies only to his paramour, not to other individuals, and that Wife testified that she did not "object to [the minor child] going to [Husband's] house" as she pleases once the child received a driver's license.

"'[T]he details of custody and visitation with children are peculiarly within the broad discretion of the trial judge'" and "the trial court's decision will not ordinarily be reversed absent some abuse of that discretion." *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Edwards v. Edwards*, 501 S.W.2d 286, 291 (Tenn. Ct. App. 1973)); *Eldridge,* 42 S.W.3d at 85. "In reviewing the trial court's visitation order for an abuse of discretion, the child's welfare is given 'paramount consideration,' and 'the right of the noncustodial parent to reasonable visitation is clearly favored.'" *Eldridge*, 42 S.W.3d at 85 (quoting *Suttles*, 748 S.W.2d at 429) (internal quotations omitted); *Wix v. Wix*, No. M2000-00230-COA-R3-CV, 2001 WL 219700, at *10 (Tenn. Ct. App. Mar. 7, 2001) ("Tennessee's General Assembly and courts have recognized that non-custodial parents have a fundamental right to visit their children."). However, "courts may restrict, suspend, or terminate visitation rights upon the presentation of clear and definite evidence that permitting continued visitation will jeopardize the child physically, emotionally, or morally." *Wix*, 2001 WL 219700, at *10; *Eldridge*, 42 S.W.3d at 85. "Under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to propriety of the decision made.'" *Eldridge*, 42 S.W.3d at 85 (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)). "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" *Id*. (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). "The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court." *Id*.

While we acknowledge that, "in reviewing child custody and visitation cases,...the welfare of the child has always been the paramount consideration," *Luke v. Luke*, 651 S.W.2d

219, 221 (Tenn. 1983), we find there to be no clear and definite evidence suggesting that contact with Husband's girlfriend would jeopardize the child's health or well-being. The trial court does not explain the "stress" imposed on the child as a result of the presence of Husband's paramour and, in fact, only discusses stressful changes in the child's life unrelated to Husband's girlfriend. In addition, Wife has testified that she had no problems with the child having unrestricted visits with Husband. In the absence of sufficient evidence of harm to the minor child from contact with Husband's paramour, we find that the trial court abused its discretion by imposing a restriction on Husband's visitation.

D. Nunc Pro Tunc Entry of the Final Decree

On January 30, 2009, the trial court entered the Final Decree of Divorce; later that day, the trial court held a hearing on Wife's Motion to Require Husband to Meet his Financial Obligations which had been filed on January 23, 2009, in which Wife asked that an order of support be entered *nunc pro tunc* to September 1, 2008.[24] The court granted the motion orally at the hearing and modified the final decree entered earlier that day by writing in hand "Nunc Pro Tunc to 8-12-08." On February 18 the trial court entered an order reflecting the action taken on all motions presented at the January 30 hearing; this order reiterated the court's statement at the January 30 hearing that Husband's "financial obligations under the Final Decree of Divorce as to his wife and child would be entered by this court *nunc pro tunc* to August 12, 2008."[25]

On February 20, 2009, Wife filed a Motion to Alter or Amend, asking, among other things, that "the Final Decree of Divorce entered in this cause be entered *nunc pro tunc* to the day and date of the Court's adoption of the Findings of Fact and Conclusions of Law in this case, which was October 27, 2008."[26] The court orally granted the motion at a hearing held on February 27; the order entered after the hearing did not include the court's ruling on the *nunc pro tunc* issue but only contained the ruling on the other issues delivered at the

---

[24] Wife's motion alleged that "[s]ince August 2008, [Husband] ha[d] refused to continue to meet his [monthly $11,000] obligation despite the fact that he has the income to do so," that Husband paid Wife only $6,700 in September 2008, and that Husband did not pay the mortgage on the marital residence for January 2009.

[25] Even though Wife's original motion requested an order *nunc pro tunc* to September 1, 2008, the trial court entered the final decree *nunc pro tunc* to August 12, 2008, because Wife's counsel asked the court at the hearing "to enter the final decree nunc pro tunc back to the last day of the trial."

[26] The Findings of Fact were actually entered on October 29. At the hearing on this motion, Wife's counsel explained that the change in the *nunc pro tunc* date was because, "if [the Final Decree of Divorce] [wa]s going to be nunc pro tunc *and survive appeal*, it probably need[ed] to be entered as of the date of the findings of fact and conclusions of law." (Emphasis added).

hearing.[27] The trial court, however, filed an amended Final Decree of Divorce on February 27, 2009, in which the only change made was striking the previously handwritten *nunc pro tunc* date of August 12, 2008, and handwriting in the date of October 29, 2008.

Husband raises both a procedural and substantive challenge to the trial court's entry of the Final Decree of Divorce *nunc pro tunc* to October 29, 2008. Husband asserts that the trial court erred in granting Wife's request to enter the Final Decree of Divorce *nunc pro tunc* because her request was not properly filed with the court and, in the alternative, because a *nunc pro tunc* modification was not proper in the present situation.

With regard to his procedural argument, Husband contends that "[t]here are two mechanisms for modifying a judgment after its entry - Rule 59 and Rule 60," Tenn. R. Civ. P., and that there was "no pending post-judgment motion filed under either Rule 59.04 or Rule 60.02 requesting [a *nunc pro tunc*] modification." Husband asserts that Wife's Motion to Require Husband to Meet his Financial Obligations, filed January 23, 2009, was actually a request for "retroactive **temporary support** and did not address entry of the final decree *nunc pro tunc*," (emphasis in original), and that Wife's Motion to Alter or Amend, filed February 20, 2009, did not "specify the grounds [under Rule 59, Tenn. R. Civ. P.] on which the request was based, was not accompanied by any legal memorandum and was not supported by any proof."

Husband does not cite any authority to support his contention that a request to have an order entered *nunc pro tunc* must be done pursuant to Rule 59 or 60, Tenn. R. Civ. P. In fact, "[t]rial courts have the inherent power, 'and it is their duty, to make their records speak the truth, and a court, therefore, in a proper case, *of its own motion*, may order a nunc pro tunc entry to be made.'" *In re Adoption of M.P.J.*, No. W2007-00379-COA-R3-PT, 2007 WL 4181413, at *8 (Tenn. Ct. App. Nov. 28, 2007) (citing *Lautenbach v. Lautenbach*, Nos. 01A01-9710-CH-00595, 01A01-9703-CH-00098, 1999 WL 326172, at *2 (Tenn. Ct. App. May 25, 1999)) (emphasis added); *see also Rush v. Rush*, 37 S.W. 13, 14 (Tenn. 1896). Thus, the trial court was permitted to enter the Final Decree of Divorce *nunc pro tunc* upon its own authority and we find that it did not err in doing so.

Husband also contends that "[e]ntry of a judgment *nunc pro tunc* is only appropriate where it can be shown by 'clear and convincing evidence that the court announced its judgment'" and that "[t]hese circumstances are simply not present in the instant case." Husband argues that "the trial court did not 'pronounce' the divorce on August 12, 2008, but took the case under advisement" and that "the trial court [did not] pronounce the parties divorced in the findings of fact entered October 29, 2008."

[27] The other issues addressed by the trial court are not at issue in this appeal.

In its Findings of Fact, the trial court stated that "Wife shall receive as alimony $11,000 per month as long as she has the home mortgage to pay" and that Wife "shall have as alimony in futuro $6,500 after the sale of her home." The final line of the court's Findings of Fact states "IT IS SO ORDERED." At the hearing on January 30 regarding Wife's Motion to Require Husband to Meet his Financial Obligations, the trial court stated that its "intent was to never let [Wife] be without support."

"A nunc pro tunc entry is an entry made now, of something which was actually previously done, to have effect as of the former date." *Cantrell v. Humana of Tennessee, Inc.*, 617 S.W.2d 901, 902 (Tenn. Ct. App. 1981). "Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had where entry thereof was omitted through inadvertence or mistake." *Id*. "[A]n entry of a judgment *nunc pro tunc* should only be granted when it can be shown by clear and convincing evidence that the judgment sought is the one previously announced." *Blackburn v. Blackburn*, 270 S.W.3d 42, 50 (Tenn. 2008).

The record shows that the Findings of Fact were entered on October 29, 2008. The court does not indicate that the findings were made in accordance with Rule 52, Tenn. R. Civ. P.; neither does the court enter judgment on the findings in accordance with Rule 58, Tenn. R. Civ. P.[28] The language in the Findings of Fact clearly indicates that the court's intention was to provide as part of the final disposition of the case that Husband would continue to pay Wife $11,000.00 per month, as he had been doing voluntarily prior to trial, and to award Wife alimony *in futuro* when the marital residence was sold. Although the docket entries reveal that several matters were addressed in the trial court between October 29, 2008 and February 27, 2009, the only effort made to address the payment of support to Wife pending the ultimate entry of a final decree was the motion filed January 23 seeking an order requiring Husband to reinstate the voluntary support payments he had suspended in August 2008. It is apparent that the court chose to grant Wife's motion by making the decree which was entered on January 30 retroactive; this was consistent with the Court's expressed intention at the hearing on Wife's motion that Wife not be without support. In light of Wife's demonstrated need for support, and the specific facts of this case, we find that the trial court did not err in entering the Final Decree of Divorce *nunc pro tunc* to October 29, 2008 in order to provide same.

[28] Indeed, the record reflects that the parenting plan which was a part of the final decree was not signed by the court until January 30, 2009; it had been prepared by Wife's counsel and the certificate of service shows that it was mailed to Husband's counsel on January 12.

E. Credibility

With regard to Husband's credibility, the trial court found that:

> 2. ...[Husband] [wa]s not a credible witness, [wa]s untruthful, and c[ould not] be believed under oath. The Court concludes that it c[ould not] credit [Husband's] testimony in this case. For example, based upon the Court's previous Findings of Fact, the Court conclude[d] that [Husband's] testimony with regard to when he began his adulterous relationship with his girlfriend [wa]s not credible.
> 3. In addition, the Court conclude[d] that [Husband] was blatantly untruthful with regard to the listing of his income on his sworn Income & Expense Statement and further f[ound] that [Husband] was untruthful in failing to disclose the additional income he generated..., which amounted to an additional $250,000.00. The Court further conclude[d] that [Husband] intentionally failed to disclose an additional $250,000.00 of income during his direct examination....
> 4. The Court further conclude[d] that [Husband] lack[ed] character and credibility with regard to his violations of this Court's statutory Restraining Order.

Wife contends that the trial court's "assessment of the Husband's credibility was based on a myriad of factors, not only his failure to disclose [$250,000.00] that he received in 2008 on his **sworn** Income and Expense Statement." (Emphasis in original). Specifically, Wife cites to the trial court's "belief that the Husband lied about when his adulterous affair began," "belief that the Husband lied when he claimed the [$25,000.00] received from Steve Maggart and used [sic] to purchase Bank of the South stock in the Husband's name was held in trust for Mr. Maggart's grandchild," and finding that Husband violated the Temporary Restraining Order.

Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier*, No. W2007-00039-COA-R3-CV, 2007 WL 2416098, *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779,783 (Tenn. 1999)). Therefore, we give great deference to the court's determinations on matters of witness credibility. *Id.* "Accordingly, we will not reevaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence." *Id.*

We find that Husband has failed to present evidence that clearly and convincingly contradicts the trial court's determination regarding his credibility.

F. Grounds for Divorce

Husband asserts that the court erred in granting Wife the divorce on the grounds of adultery because such ground is not appropriate "when the adultery occurred after the marriage was irretrievably broken." He contends that "to find his marriage ended by adultery is a fiction." Husband cites this Court's opinion in *Hazlehurst v. Hazlehurst*, No. 01-A-01-9211-CV00435, 1993 WL 115674 (Tenn. Ct. App. April 16, 1993) in support of this proposition.

Hazlehurst was a memorandum opinion, decided pursuant to Rule 10 of the Rules of the Court of Appeals, which states:

> [w]hen a case is decided by memorandum opinion it...shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Consequently, *Hazlehurst* has no precedential value in the resolution of this case.[29]

Our review of the record shows not only Husband's admission of adultery in his answer to the amended complaint, but the proof at trial affirms his admission. Having determined that the evidence does not preponderate against the trial court's finding, we affirm the finding of adultery as a ground for the divorce.

G. Recusal of Trial Court

Husband asserts that the trial court should be recused from further proceedings because of a perceived lack of impartiality. Husband complains that the court was "motivated by...'extrajudicial' considerations," which were "evidence[d] from the trial court's handling of various issues that arose both during the trial and post-trial." Wife contends that the trial court's actions were not inappropriately influenced, but rather were based on Husband's "utter contempt for the court's orders, the dignity of his Wife, the well-being of his child," and the requirement to tell the truth. Wife also points to Husband's repeated "disregard of the Temporary Restraining Order."

---

[29] In addition, *Hazlehurst* is distinguishable from the case at hand. In *Hazlehurst*, wife's allegation of husband's adultery was an allegation of "ill conduct" in support of her affirmative defense against his complaint of inappropriate marital conduct rather than an allegation made as a ground for divorce. *Id*. at *1-2; *see* Tenn. Code Ann. § 36-4-120(a) ("If the cause assigned for a divorce is [inappropriate marital conduct], the defendant may make defense by alleging and proving the ill conduct of the complainant as a justifiable cause for the conduct complained of."). *Hazlehurst* does not stand for the proposition that there is a defense to adultery as a ground for divorce other than those expressly set forth at Tenn. Code Ann. § 36-4-112.

"All litigants have a right to have their cases heard by fair and impartial judges." *Davis v. Tennessee Dept. of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). "Parties who challenge a judge's impartiality must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned." *Id*. "Impartiality concerns involve a judge's personal bias or prejudice against a litigant." *Id*.

We have reviewed the transcripts of the trial and various hearings and note many comments by the court that lend credence to Husband's perception that the court was biased against him. The court clearly found Husband not to be credible and many of the court's comments broached the line of antipathy toward Husband. We are particularly concerned with the court's seemingly cavalier treatment of Ms. Edge and Mr. Riccardi, witnesses called on behalf of Husband, whose testimony the court disregarded without substantial explanation, and we posit whether the court's finding that Husband was not credible colored its duty to dispassionately consider evidence from those as to whom the court made no adverse credibility determination. We are also troubled by the court's combative attitude when Husband's counsel made an oral motion for recusal. Every litigant is entitled to walk into court with the confidence of knowing that their case will be heard by a neutral and detached judge and, more importantly, leave the court with the same confidence.

This was a difficult case, as many domestic relations cases are, and it was not made easier by certain of Husband's actions, e.g., purchasing an automobile contrary to the requirements of the temporary restraining order and failing to completely disclose the facts and circumstances of his law practice accounts receivable. While we do not find that the court was actually biased against Husband, we do find substantial basis in the record upon which the court's impartiality might reasonably be questioned. On remand, the trial court is directed to refer this case to the presiding judge for reassignment. *See* Rule 3.04, Local Rules of Court of the Twentieth Judicial District.

H. Attorney's Fees on Appeal

Wife also seeks an award of attorney's fees incurred on appeal.

In *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407 (Tenn. Ct. App. Sept. 1, 2006), this Court addressed the issue of an award of attorney's fees incurred on appeal:

> In appropriate circumstances, appellate courts may award prevailing parties their legal expense incurred on appeal. These awards are generally withheld when both parties have been at least partially successful. Decisions regarding a request for attorneys fees on appeal in a divorce case should be

> made using the same factors in Tenn. Code Ann. § 36-5-101(d)(1) (Supp. 2000) used to determine whether a spouse should receive an award for legal expenses incurred in the trial court. These awards should be viewed as spousal support. Thus, parties may be entitled to an additional award for their legal expenses if they demonstrate that they lack sufficient funds to pay their legal expenses or that they would be required to deplete other needed assets to do so.

Id. at *11 (internal citations omitted).

For the same reasons we have determined that an award of Wife's fees for the trial of this case is appropriate, we find that Wife is entitled to award of attorney's fees incurred on appeal. On remand, the court is directed to determine the amount of reasonable and necessary attorney's fees incurred by Wife as a result of this appeal and to award judgment therefor. *See Folk v. Folk*, 357 S.W.2d 828, 829 (Tenn. 1962); *Fox*, 2006 WL 2535407, at *11.

IV. Conclusion

For the reasons set forth above, this court AFFIRMS the trial court's findings that Husband was voluntarily underemployed, regarding Husband's credibility, that the Bank of the South stock was marital property and the ground upon which the divorce was granted and AFFIRMS the orders for Husband to pay the marital debt, maintain life insurance for the benefit of the minor child and entry of the final decree *nunc pro tunc*. The trial court's awards of spousal and child support and division of marital property are REVERSED and REMANDED for reconsideration. The trial court's restriction on Husband's visitation and setting of the parenting schedule are REVERSED and the issue of an appropriate parenting schedule REMANDED for reconsideration. The trial court's decision to award attorney's fees to Wife is AFFIRMED and the issue remanded for a redetermination of the amount to be awarded; Wife's request for attorney's fees incurred on appeal is granted and the matter remanded to the trial court to determine the reasonable and necessary fees incurred on appeal. On remand, the trial court is directed to refer this case to the presiding judge for reassignment.

Costs are assessed against equally between the parties.

RICHARD H. DINKINS, JUDGE